IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 302 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SAGOR BADARBHAI RANCHHODBHAI & 5 - Appellant(s)
Versus
SAGOR HIRABHAI BHIKHABHAI VAGHADIA & 2 - Defendant(s)

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Appearance :
MR SP MAJMUDAR for Appellant(s) : 1 - 6.
MS SONAL SHAH FOR MR YN OZA for Defendant(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 23/03/2007

ORAL JUDGMENT

1. Mr.S.P. Majmudar, learned counsel for the appellants and Ms.Sonal Shah, learned counsel for the respondents.

2. The appeal has been admitted for hearing the parties on the following substantial questions of law:-

> “In the facts and circumstances of the case, whether the lower appellate court has committed a substantial error of law in coming to the conclusion that the respondents – defendants cannot be said to be joint owners of the suit property, even though the original document of the title is in favour of the grand-father of the appellants – plaintiffs, which is at Ex.78 and the defendants have failed to establish that they were descendant of original owner of the suit property, being Sankhla Bhagvan? “

3. Short facts necessary for disposal of the present appeal are that the plaintiffs – appellants filed a suit against the defendants submitting inter-alia that under Parvana No.1011 dtd.14/9/1914, the erstwhile ruler of Idar State had granted some land in the name of Sankhla Bhagvan. Accordingly, the said Sankhla Bhagvan became owner of the property, the measurements of the land were 31 ft.

East-West and 17 ft. & 9 inch North-South. According to the plaintiffs, they had constructed a kuchcha hut and were using the same for keeping their agricultural implements and other articles. The defendants on 22/1/1977 committed trespass, demolished the hutment and for those wrong committed by them, a complaint was lodged, the plaintiffs, therefore, filed the suit on 25/1/1977 to recover actual possession of the suit land from the defendants and a decree for Rs.1500=00 towards the losses suffered by them because of demolition of hutment.

4. The defendants appeared before the trial court and submitted that though the Parvana was executed in favour of Sankhla Bhagvan but the property was given for the interest of the family and the defendants were the joint owner of the property. It was also submitted that the suit land was partitioned in presence of Panch and the writing was made on 4/3/1968. They submitted that as they were in possession of the property in their exclusive rights, the plaintiffs were not entitled to any decree in their favour. As the parties had joined the dispute, the trial court framed certain issues and

proceeded to record the evidence. After hearing the parties, the trial court decreed the suit. The defendants, being aggrieved by the said judgment and decree, filed the Regular First Appeal, which was allowed by the learned first appellate court, hence the plaintiffs are before this Court.

5. Mr.Majmudar, learned counsel for the appellants submits that the writing dtd.4/3/1968 was not admissible in evidence as it was creating rights in the tangible immovable property and if such document is not admissible, then, the defendants are unable to prove that they were joint owners and a partition was effected. His further submission is that the learned first appellate court erred in holding that though the document was in the name of Sankhla Bhagvan only, the defendants' predecessor-in-title also had right in the property. According to him, the findings recorded by the learned first appellate court are bad and deserve to be set aside.

6. Ms.Sonal Shah, learned counsel for the respondents, on the other hand submitted that the document dtd.4/3/1968 may be inadmissible in evidence so far as it

creates exclusive rights in favour of the defendants, but the admission otherwise made in the said document would bind the plaintiffs. It is also submitted that the learned court below has given cogent reasons for holding that the defendants are joint owners.

7. Sec.17 of the Indian Registration Act provides that whenever a transaction relating to tangible immovable property worth more than Rs.100=00 is effected for creating any right, title or interest in the said property, then, the document is required to be registered. For the property worth Rs.100=00 or less, oral sale, with delivery of the property, would be sufficient.

8. Sec.49 of the Indian Registration Act provides that a document which is required under the law to be registered, if is not registered, the same would be inadmissible in evidence. Explanation appended to sec.49, however, provides that such unregistered document would be admissible in evidence if the document is the foundation in a suit for specific performance of the agreement and for collateral purposes.

9. Different courts have held that unregistered document would be inadmissible so far as it relates to assignment, transfer or alienation or creating any right, title or interest in the tangible immovable property, but the courts have held that such document can be used for collateral purposes. The courts have also held that it would impossible to define that what the collateral purpose would be, but the courts are of the opinion that barring the above referred assignment etc. all other purposes would be collateral.

10. In the present matter, learned first appellate court has taken into consideration earlier conduct of the parties, the court has held that in relation to some other parcels of land, the parties are shown to be joint owners, the court observed that if this parties are not relations or related to each other, then, there was no reason for recording their names jointly in the revenue records. On basis of the revenue records, the court has come to the conclusion that the parties are relations.

11. The appellate court has also held that it was not

unknown to the system that a document was issued or executed in favour of one person only but the document was to create interest of many. The appellate court, after appreciating the evidence of the parties and after taking into consideration the totality of the circumstances, had recorded a finding that the parties are joint owners.

12. True it is that the factum of the partition effected by the document dtd.4/3/1968 would not be admissible, but the court would be entitled to see that whether the defendants were given possession and if yes, whether they were put in possession, being joint owners of the property. The appellate court, after taking into consideration the document for collateral purpose only, has observed that the defendants are in possession of the property in capacity of the joint owners.

13. Once the case of the plaintiffs that the defendants made trespass, falls to the ground and it is held that the parties are joint owners, then, such joint owner cannot seek a decree for possession on the ground that the other party is trespasser. The learned first appellate court was absolutely justified in setting aside the judgment and

decree of the trial court and dismissing the suit.

14. After arguments were completed and when the court recorded some part of the judgment, Mr.Majmudar, learned counsel for the appellants submitted that the appellant No.4 had expired.

15. In case like present, I do not think that the conduct of the appellants is proper. If the appellant No.4 was dead and it was so then, an application for substitution of legal representatives ought to have been filed or at least before opening the arguments, a statement could have been made that the appeal qua appellant No.4 had abated.

16. Mr.Majmudar, learned counsel for the appellants submits that in absence of an application for substitution of the legal representatives, the appeal qua the appellant No.4 had abated.

17. Order XXII Rule 3 of the Code of the Civil Procedure clearly provides that, in case of death of sole or one of the plaintiff, an application for substitution of the legal

representatives, is required to be made, if the cause of action survives in favour of remaining plaintiffs and/or legal representatives / successors of the deceased plaintiffs. In case, an application for substitution is not made right in time, the cause would abate qua such plaintiff. If he is the sole plaintiff, then the whole matter would abate and if he is one of the plaintiffs, then, qua such plaintiff, the cause would abate.

18. In the present case, Mr.Majmudar, learned counsel for the appellants submits that the appeal, so far as the interest of the appellant No.4 is concerned, had abated.

19. The question still would be that what would be the effect of abatement of the appeal qua appellant No.4. Whether the appeal would partly abate or it would abate as a whole. The plaintiffs had filed the suit as joint owners of the property, they were not claiming independent rights, but, they had come to the court saying that the land belonged to Sankhla Bhagvan and the plaintiffs being successors, are entitled to take possession of the property. None of the plaintiff was seeking independent relief, but the plaintiffs jointly were

seeking relief against the defendants / trespassers. If the judgment and decree passed against the interest of the appellant No.4 namely Sagor Dahyabhai Dhulabhai is confirmed as his legal representatives are not made parties, then, the whole cause would abate, because, a partial decree cannot be granted. Be that as it may.

20. Even on the merits, I do not find any reason to interfere, the appeal deserves to and is accordingly dismissed. Interim relief, if any, is vacated. No costs.

(R.S. GARG, J.)

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